(3)

No. 90-485

In The

Supreme Court of the United States

October Term, 1990

JASON WILLIAMS,

Petitioner,

v.

PIMA COUNTY, THE PIMA COUNTY MERIT COMMISSION AND CLARENCE W. DUPNIK, Sheriff of Pima County,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Arizona

BRIEF IN OPPOSITION OF RESPONDENTS PIMA COUNTY AND CLARENCE W. DUPNIK, SHERIFF OF PIMA COUNTY

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THE WRIT SHOULD NOT ISSUE

I. Petitioner's factual claims are not shown by the record.

Petitioner was dismissed from his employment with Pima County as a Corrections Officer in September, 1982. Petitioner was a permanent employee at the time.

Under the system then (and now) in effect, Petitioner appealed his dismissal to the Merit System Commission, a statutory body created for that purpose. That body was the trier of fact issues in deciding upon the propriety of the dismissal. Arizona Revised Statutes, § 11-356. The court, in reviewing a decision of the Merit Commission, must affirm the decision of the commission if there is any substantial evidence to support it in the record. *DeGroot v. Arizona Racing Comm.*, 141 Ariz. 331, 686 P.2d 130 (App. 1984). The trial court in conducting judicial review may not reweigh the evidence to resolve what appear to be conflicts. *Schade v. Arizona State Retirement System*, 109 Ariz. 397, 510 P.2d 42 (1973). Review by the courts is limited to questions properly raised in the administrative hearing. *Madsen v. Fendler*, 128 Ariz. 462, 626 P.2d 1094 (1981). Petitioner's dismissal was upheld by the commission.

There is no evidence to demonstrate that Petitioner developed his claim – Lack of Pre-termination Due Process – before the Merit Commission. The existing record does show that Petitioner " . . . was aware of the charges for his termination; that he understood them, but did not agree with them." (See Appendix F from Petition, Report of Merit Commission Hearing Officer at p. A-32 of the Petition).

Petitioner has made all variety of other factual assertions about things which he claims did not occur:

a. He was not informed of the rules he was accused of violating. (Petition, p. 4)

b. he was not informed of the evidence supporting his termination. (*Id.*)

c. He was not informed of the pendency or contemplation of a dismissal from employment. (*Id.*)

d. He was not given the opportunity to prepare a response and submit evidence on his own behalf. (*Id.*)

e. He was not given the opportunity to explain why a penalty less than termination should be imposed. (*Id.*)

f. He was not " . . . informed of the specific reasons for which he was being terminated, given an opportunity to review the evidence against him, compare it to the charges against him or state why the evidence was wrong, why the violations did not occur or if they did occur, why he should not be terminated." (Petition, p. 4)

g. He was notified for the first time of the rules he was being fired for after his termination. (Petition, pp. 4-5)

h. He was never given notice of the specific charges, the employer's evidence or that he had a chance to tell his side of the story. (Petition, p. 10)

i. He was not informed of evidence, no opportunity to be heard, not informed of rules violated, not given notice or opportunity to respond to charges or punishment. (Petition, p. 14)

> j. He was questioned without disclosing the evidence on which allegations are based, without notice that he could be fired, without telling him what he did that was wrong. (Petition, p. 16)

These claims provide a dramatic quality to the petition, and might, but for a complete lack of evidence, incline the Court to grant the Writ.

Petitioner suggests that if the record is silent, then he is justified in claiming that the silent record is evidence of the facts enumerated above. (Petition, pp. 10-11) Under normal circumstances the lack of logic in this position is fairly obvious. Where the record is known to be vastly incomplete, the same contention borders on exaggeration. In fact the hearing officer's report shows positively that Petitioner understood the charges.

When the testimony and other evidence was being adduced at the Merit commission hearing, a court reporter was making a verbatim record of the proceedings. As a back-up, tape recordings were also made of the testimony. Both of these methods are in accordance with the rules of the Commission.

Transcripts of the testimony were never prepared because the reporter's notes and tapes were damaged in October, 1984. As a result, the matter proceeded to judicial review, normally a statutory review on the record, on the summary of the testimony made by the hearing officer, together with transcripts of some conversations in the internal affairs division and other documentary evidence. A request by Petitioner for *trial de novo*, based on unavailability of a complete record, was denied. The Court, however, left Petitioner the opportunity to present

testimony if necessary (Appendix A). No such testimony was ever sought or presented by Petitioner.

Petitioner has quoted at length from his Notice of Appeal, the document which activated his employment appeal rights. (Petition, pp. 5-6) While it is true that he claimed lack of due process, there is nothing to indicate that he ever produced evidence in support of this claim. The only reference to the subject is in the hearing officer's report (see p. A-32 of the Petition) where Petitioner himself testified that he was aware of and understood the grounds for his termination.

In summary, while the record which remains does show that certain things *did* occur, lack of evidence, in a record known to be incomplete, cannot be asserted to claim that certain things *never* happened. The existing record, indeed, shows no effort on petitioner's part to produce evidence of a failure of pre-termination due process.

II. The portions of the record which do exist were held by the Arizona Court of Appeals to satisfy procedural due process in light of *Loudermill* (*Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985)). Petitioner has contended that the result of that court is inconsistent with the *Loudermill* decision.

Petitioner was dismissed for improper handling of prisoner records at the jail and for disobedience to an order to answer questions about job-relevant off-duty conduct. The decision of the Arizona Court of Appeals found that Petitioner knew about the jail records at his house and was given an opportunity to provide an explanation for these records being at his house. The same

court found that Petitioner was clearly told that he could be fired for refusing to answer questions about the off-duty allegations of impersonating a law enforcement officer. If Petitioner was suffering from a shortage of information on this occasion, the record fails to disclose it. Petitioner did assert in his administrative appeal such a claim, but only in broad general conclusory terms. No evidence supports this claim, and existing evidence shows that he knew of, understood and disagreed with the accusations. The *Loudermill* decision, where Plaintiff received a plenary post termination hearing, as he did here, requires nothing more than an " . . . initial check against mistaken decisions. . . . " 470 U.S. 532 at 546.

III. Petitioner's second issue addresses the scope of permissible questioning under the doctrine of *Garrity v. New Jersey*, 385 U.S. 493 (1967). He contends that he may not be ordered to answer questions by his public employer about off-duty misconduct, even where that off-duty misconduct is of admitted legitimate concern to the public employer. Cited for this idea are *Gardner v. Broderick*, 392 U.S. 273 (1968); *Uniformed Sanitation Men Assoc. v. Commissioner of Sanitation of the City of New York*, 392 U.S. 820 (1968); *Lefkowitz v. Turley*, 414 U.S. 70 (1973); and *Lefkowitz v. Cunningham*, 431 U.S. 801 (1977). All of these cases have used the well known language of *Gardner v. Broderick*:

> "If Appellant, a policeman, had refused to answer questions specifically, directly and narrowly relating to the performance of his official duties, without being required to waive his immunity with respect to the use of his answers or the fruits thereof in a criminal prosecution of

himself . . . the privilege against self-incrimination would not have been a bar to his dismissal." 392 U.S. at 278.

The operative part of this quotation in the context of this case is " . . . specifically, directly and narrowly relating to the performance of his official duties. . . . "

The four cases cited by Petitioner, although they include this language, have nothing whatsoever to do with the scope of such questioning. In *Gardner*, a police officer was being questioned about accepting bribes; in *Uniformed Sanitation Men*, employees were being questioned about stealing money from the City of New York, their employer; in *Lefkowitz v. Turley*, architects with contracts with the State of New York were being questioned about procurement fraud and bribery; in *Lefkowitz v. Cunningham*, an officer in a political party was being questioned about suspected political misdeeds. Each case held that sanctions could not follow refusal to answer questions unless the person compelled to answer was provided the functional equivalent of use immunity. In each case that immunity was missing.

More importantly the cases do nothing at all to define the scope of proper questioning. None of these cases involved scope of questioning as an issue presented to be ruled on. Each case did suggest that the questioning that was under consideration was appropriate in constitutional scope, but no such issue was actually decided by the court.

Petitioner has not undertaken to cite a single case which has ruled on questioning about off-duty but job-

relevant conduct. In fact the courts have permitted questions which touch upon off-duty conduct and other rather personal matters as relating to job performance where law enforcement employees are concerned. See *Broderick v. Police Commissioners of Boston*, 330 N.E. 2d 199 (Mass. 1975), cert. denied, 423 U.S. 1048; *O'Brien v. DiGrazia*, 544 F.2d 543 (1st Cir. 1976), cert. denied, 431 U.S. 194; *Gulden v. McCorkle*, 680 F.2d 1070 (5th Cir. 1982).

The result sought by Petitioner would be of little value to public employees' rights to be free from self-incrimination. The establishment of use immunity provides all the protection that exists under the Constitution. *Murphy v. Waterfront Commission*, 378 U.S. 52 (1964). Petitioner has admitted that the suspected off-duty criminal conduct of impersonating a law enforcement officer and stopping and assaulting women motorists at night, is a matter of legitimate job-related concern to his public safety employer, the Sheriff of Pima County. Petitioner nevertheless contends that his employer may not demand an accounting for this suspected misconduct from an employee because it occurred off-duty instead of at work. Petitioner maintains this position despite the fact that the use immunity missing in *Gardner, Lefkowitz*, et al., is uncontrovertably present here.

To permit Petitioner's position to prevail would provide a constitutionally purposeless impediment to information which is acknowledged by Petitioner to be of proper concern to any employer in the corrections or law enforcement field.

CONCLUSION

The petition should be denied. Petitioner has asserted facts in support of his due process claim which are not supported by the record and in some instances contradicted by it. The petition makes legal claims, which are equally unsupported, that the action of the Arizona Court of Appeals is in conflict with decisions of this court and "almost every" federal court of appeals and state courts to have ruled on this issue. This rhetoric ignores both the letter and spirit of the *Loudermill* decision in a setting where a full blown post termination hearing is assured.

The second issue articulated by Petitioner fares no better. He actually suggests that a public employer cannot compel an accounting from his law enforcement employee respecting off-duty conduct of admitted legitimate concern to the employer, even when the use immunity of *Garrity v. New Jersey* is clearly established. In support of this, Petitioner cites four decisions which did not address this issue. If particular off-duty conduct impacts a legitimate area of employer concern, then it is related to the performance of duties. If the sheriff could fire Petitioner for it, why shouldn't he be able to insist on answers to questions about it.

The position sought by Petitioner is strained, creating an artificial, senseless barrier to relevant information.

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APPENDIX A

ARIZONA SUPERIOR COURT, PIMA COUNTY

JUDGE: MICHAEL J. BROWN CASE NO. 206977

Court Reporter: None DATE June 9, 1986

JASON WILLIAMS (P) Kenneth K. Graham

-vs-

THE COUNTY OF PIMA, et al. (D) Michael P. Callahan

Barry Corey

* * *

MINUTE ENTRY

HEARING RE PLAINTIFF'S MOTION TO CONTINUE AND MOTION FOR TRIAL DE NOVO AND DEFENDANTS' MOTION TO DISMISS:

Parties not present;

Counsel argue to the Court.

IT IS ORDERED the motion to dismiss is DENIED.

IT IS FURTHER ORDERED the motion for trial de novo is DENIED.

IT IS FURTHER ORDERED the motion for reconsideration of the ruling by Judge Roylston on July 21, 1984 and motion to compel is DENIED.

IT IS FURTHER ORDERED this matter may proceed in its current posture as an appeal on the record, the file, exhibits, hearing officer's report and findings.

IT IS FURTHER ORDERED that motion to continue trial date is DENIED, and the trial date of August 8, 1986 is CONFIRMED.

Since the facts are no longer in dispute,

IT IS ORDERED the attorneys file with the Court a briefing schedule.

THE COURT FINDS that if there is some reason Plaintiff believes that the taking of testimony is necessary to avoid manifest injustice, Plaintiff is to file a pleading to that effect.

THE COURT FINDS the dates the hearing being appealed from were held commencing on October 21, 1982 and completed on October 27, 1982.

THE COURT FURTHER FINDS the date the complaint was filed was January 25, 1983.

THE COURT FURTHER FINDS the fact that pursuant to uncontroverted affidavit, a full and accurate copy of the transcripts could have been prepared through the month of October, 1984.

THE COURT FURTHER FINDS that Plaintiff did not order the transcript in the complaint and that the denial of the motion to compel, which included the transcript, took place 70 days prior to the destruction of the recording of the hearing, and there was no action taken by the Plaintiff during that period of time to order the transcript.

cc: Hon. Michael J. Brown (individually assigned)
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Michael Callahan, Esq. (Pima County Attorney's Office)
Barry Corey, Esq. (Corey & Farrell)
